Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-445

JOAN ANDERSON, Director of Illinois Department of Registration and Education,

Petitioner,

vs.

BARBARA BARASA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTION PRESENTED FOR REVIEW	4
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	15
APPENDIX A	A1
APPENDIX B	B1

CITATIONS

CASES: PAGE

Chase Securities Corp. v. *Donaldson*, 325 U.S. 304, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945) 14

Corporate Commission of State of Oklahoma v. *Lowe*, 281 U.S. 431, 74 L. Ed. 945, 50 S. Ct. 397 (1930) 10

Dent v. *State of West Virginia*, 129 U.S. 114, 32 L. Ed. 623, 9 S. Ct. 231 (1889) 11

Ferguson v. *Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963) 11, 13

Hardware Dealers Mutual Fire Insurance Co. of Wisconsin v. *Glidden Co.*, 284 U.S. 151, 76 L. Ed. 214, 52 S. Ct. 69 (1931) 10

Hitchcock v. *Collenberg*, 140 F. Supp. 894 (D. Md. 1956), *aff'd mem.* 353 U.S. 919, 1 L. Ed. 2d 718, 77 S. Ct. 679 (1956) 11

Kelley v. *Johnson*, 425 U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1977) 10, 12

Kotch v. *Board of River Port Pilot Commissioners for Port of New Orleans*, 330 U.S. 552, 91 L. Ed. 1093, 67 S. Ct. 910, *reh. den.*, 331 U.S. 864, 91 L. Ed. 1869, 67 S. Ct. 1196 (1947) 13

Land v. *Dollar*, 330 U.S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009 (1947) 3

Lenhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 35 L. Ed. 2d 351, 93 S. Ct. 1001, *reh. den.*, 411 U.S. 910, 36 L. Ed. 2d 200, 93 S. Ct. 1523, *reh. den.*, 411 U.S. 910, 36 L. Ed. 2d 201, 93 S. Ct. 1523 (1973) 11

McDonald v. *Board of Election Commissioners of Chicago*, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969) 10, 13

McGowan v. *Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961) 10, 13

N. C. Freed Co., Inc. v. *Board of Governors of Federal Reserve System*, 473 F. 2d 1210 (2nd Cir.) *cert. den.*, 414 U.S. 827, 38 L. Ed. 2d 61, 94 S. Ct. 48 (1973) 14

New Orleans Public Service v. *City of New Orleans*, 281 U.S. 682, 74 L. Ed. 1115, 50 S. Ct. 449 (1930) 10, 12

Olsen v. *State of Nebraska ex rel. Western Reference and Bond Assoc., Inc.*, 313 U.S. 236, 85 L. Ed. 1305, 61 S. Ct. 862 (1941) 11, 13

Rios v. *Jones*, 63 Ill. 2d 488, 348 N.E. 2d 825, *appeal dismissed*, 429 U.S. 934, 50 L. Ed. 2d 304, 97 S. Ct. 346 (1976) 11

Salyer Land Co. v. *Tulare Water District*, 410 U.S. 719, 35 L. Ed. 2d 659, 93 S. Ct. 1224 (1973) 10

Semler v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L. Ed. 1086, 55 S. Ct. 570 (1935) 11

Texas Medical Association v. *Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976) 14

U.S. v. *General Motors Corp.*, 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945) 3

Watson v. *Maryland*, 218 U.S. 173, 54 L. Ed. 987, 30 S. Ct. 644 (1910) 11

Williamson v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461, *reh. den.*, 349 U.S. 925, 99 L. Ed. 1256, 75 S. Ct. 657 (1955) 11, 13

CONSTITUTIONAL PROVISION:

United States Constitution, Fourteenth Amendment, Section 1 .....5, 6

ILLINOIS STATUTE:

Ill. Rev. Stat., 1965, ch. 91, § 5(3) 5, 6, 11, 12, 13, 14

IN THE

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OCTOBER TERM, 1978

No. ——

JOAN ANDERSON, Director of Illinois Department of Registration and Education,

Petitioner,

vs.

BARBARA BARASA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Joan Anderson, Director of Illinois Department of Registration and Education, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 19, 1978.

OPINIONS BELOW

The order of the Court of Appeals for the Seventh Circuit, which will not be published pursuant to Circuit Rule 35 of the Court of Appeals for the Seventh Circuit, is included herein as Appendix A. The memorandum opinion and order of the District Court for the Northern District of Illinois, Eastern Division, which is not reported, is included herein as Appendix B.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on June 19, 1978. No petition for rehearing was filed. This petition is filed within 90 days of June 19, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). *See, Land* v. *Dollar,* 330 U.S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009 (1946); *U.S.* v. *General Motors Corp.,* 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945).

QUESTION PRESENTED

Whether a state, to satisfy the "Rational Basis" test enunciated by this Court in connection with due process and equal protection challenges to a state statute, must present *evidence in all cases* demonstrating why a statute was passed and what social benefit is expected to flow from that statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., 1965, ch. 91, § 5(3):

> § 5. Minimum standards of professional education
>
> Except as provided in Section 9a of this Act,[1] the minimum standards of professional education to be enforced by the department in conducting examinations and issuing licenses shall be as follows:
>
> * * *
>
> 3. Midwifery. For the practice of midwifery: That he be a granduate of a college of midwifery which requires as a prerequisite to admission thereto, a one year's course of instruction in a high school or its equivalent, and required as a prerequisite to graduation, a one year's course in such college of midwifery, the time actually spent under instruction in such college of midwifery to have been not less than 12 months; such high school or equivalent school, and such college of midwifery having been in good standing in the judgment of the department.
>
> Without prejudice to licenses heretofore issued under this section, no further licenses shall be issued under this section after the effective date of this amendment.

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1. Section 9a of this Chapter.

STATEMENT OF THE CASE

This matter involves a suit, brought by two groups of plaintiffs pursuant to 42 U.S.C. § 1983, which challenges the constitutionality of Ill. Rev. Stat., 1965, ch. 91, § 5(3). Section 5(3) discontinued the authority of the Illinois Department of Registration and Education to issue new licenses to engage in the practice of midwifery without prejudice to those licenses already in existence. It states in pertinent part:

> Without prejudice to licenses heretofore issued under this section, no further licenses shall be issued under this section after the effective date of this amendment. Ill. Rev. Stat., 1965, ch. 91, § 5(3).

Plaintiffs in their complaint sought a declaration that Section 5(3) is unconstitutional and an injunction restricting the Director of the Department of Registration and Education from implementing the statute.

The first group of plaintiffs, expectant parents who wished to have their children delivered at home by a licensed midwife, alleged that Section 5(3) deprived them of their fundamental right to privacy and freedom of expression in selecting the childbirth attendant of their choice.

The second group of plaintiffs is composed of persons who are allegedly qualified to practice midwifery but are unable to because of Section 5(3). This second group of plaintiffs alleged that Section 5(3) deprived them of their right to engage in the profession of their choice in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. They further alleged that Section 5(3) discriminated against them in violation of the Equal Protection Clause of the Fourteenth Amendment. This claim is based on the premise that plaintiffs are

just as qualified to practice midwifery as midwives licensed prior to the effective date of Section 5(3) in 1965, and therefore, there is no rational basis for permitting that latter group to engage in the practice of midwifery but not the former group.

Defendant countered plaintiff's complaint with a Motion to Dismiss. Plaintiffs sought to put evidence before the District Court in support of the allegations in their complaint and in their motion for preliminary injunction. On October 12, 1977 plaintiffs presented one witness. However, the District Court declined to hear any more evidence until it had ruled on defendant's motion to dismiss. On November 23, 1977 the District Court granted defendant's motion to dismiss. (See, Appendix B). The District Court held that "there is no fundamental right to choose to have childbirth at home with the assistance of qualified licensed midwives." Appendix B at p. B3. The District Court then applied the rational basis test to the due process objections of both groups of plaintiffs to Section 5(3) and upheld the validity of Section 5(3) stating that,

> "[I]t is not difficult to imagine any number of safety and health-related reasons that the Illinois legislature could have had for its decision to limit future childbirth care to licensed physicians and specially qualified chiropractors. We need not determine what the legislature's true motivations were, as the Supreme Court in *Lee Optical* felt it unnecessary to determine which of many rational conclusions the legislature might have reached. It is enough that we perceive that the action of the legislature is not capricious and arbitrary." Appendix B at p. B4.

In respect to plaintiffs prospective midwives' equal protection argument the District Court held that "Illinois does not exceed its powers when it decides not to allow the num-

ber of practicing midwives within its borders to increase." Appendix B at p. B5.

On appeal to the Court of Appeals, the Seventh Circuit affirmed the decision of the District Court in respect to the claims of plaintiffs expectant parents. However, in respect to the claims of plaintiffs prospective midwives, the Seventh Circuit reversed and remanded. The Court of Appeals held that the District Court properly applied the rational basis test, but that it erred in its interpretation of that test. The Seventh Circuit held that to satisfy the limited judicial review function under the rational basis test in respect to reviewing state legislation, the state must present "evidence suggesting why a statute was passed and what social benefit is expected to flow from that statute." Appendix A at p. A6. It is this interpretation of law by the Seventh Circuit on which petitioner seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The decision below, involves the scope of judicial review in respect to state legislation, and erroneously places the burden on a state to prove the constitutionality of state statutes. The central question presented here is whether, whenever the validity of a statute is challenged, a state must present some evidence showing why the statute was enacted and what benefit is expected to flow therefrom. This is the burden imposed by the Seventh Circuit in the case at bar.

This burden is increased with regard to Illinois legislation enacted prior to 1971 because no legislative history was ever compiled with regard to these statutes. Therefore, with regard to statutes passed prior to 1971 the burden imposed by the Seventh Circuit is almost impossible to meet.

ARGUMENT

I.

THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS OF THIS COURT BOTH IN PRINCIPLE AND FACT CONCERNING JUDICIAL REVIEW OF STATE LEGISLATION UNDER THE RATIONAL BASIS TEST WHERE EQUAL PROTECTION AND DUE PROCESS QUESTIONS ARE INVOLVED.

This Court has enunciated several well-settled rules of law to guide courts in the task of adjudicating constitutional challenges to state legislation. First, a statute dealing with a subject within the scope of its legislative power is presumed constitutional. *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969); *Hardware Dealers Mutual Fire Insurance Company of Wisconsin* v. *Glidden Co.*, 284 U.S. 151, 76 L. Ed. 214, 52 S. Ct. 69 (1931); *See, Kelley* v. *Johnson*, 425 U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976). If any set of facts may reasonably be conceived to justify the enactment of a statute, the validity of the statute must be upheld. *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719, 35 L. Ed. 2d 659, 93 S. Ct. 1224 (1973); *McGowan* v. *Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). Any doubts concerning the validity of state legislation must be resolved in favor of the state. *Corporation Commission of State of Oklahoma* v. *Lowe*, 281 U.S. 431, 74 L. Ed. 945, 50 S. Ct. 397 (1930).

Second, the burden of proving the unconstitutionality of state legislation rests with the person assailing the statute. *New Orleans Public Service* v. *City of New Orleans*, 281 U.S. 682, 74 L. Ed. 1115, 50 S. Ct. 449 (1930). To satisfy that burden the person challenging the statute must negative every conceivable basis that might support its validity. *Lenhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 35 L. Ed. 2d 351, 93 S. Ct. 1001, *reh. den.* 411 U.S. 910, 36 L. Ed. 2d 200, 93 S. Ct. 1523, *reh. den.*, 411 U.S. 910, 36 L. Ed. 2d 201, 93 S. Ct. 1523 (1973).

Third, under our system of government, it is up to legislatures, not courts, to pass on the wisdom and utility of legislation. *Ferguson* v. *Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963); *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461, *reh. den.*, 349 U.S. 925, 99 L. Ed. 1256, 75 S. Ct. 657 (1955); *Olsen* v. *State of Nebraska ex rel. Western Reference and Bond Assoc., Inc.*, 313 U.S. 236, 85 L. Ed. 1305, 61 S. Ct. 862 (1941).

Fourth, a state's police power is most extensive concerning the regulation of the practice of medicine within its borders. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L. Ed. 1086, 55 S. Ct. 570 (1935); *Watson* v. *Maryland*, 218 U.S. 173, 54 L. Ed. 987, 30 S. Ct. 644 (1910); *Dent* v. *West Virginia*, 129 U.S. 114, 32 L. Ed. 623, 9 S. Ct. 231 (1889); *Hitchcock* v. *Collenberg*, 140 F. Supp. 894 (D. Md. 1956), aff'd mem. 353 U.S. 919, 1 L. Ed. 2d 718, 77 S. Ct. 679 (1957); *Rios* v. *Jones*, 63 Ill. 2d 488, 348 N.E. 2d 825, *appeal dismissed*, 429 U.S. 934, 50 L. Ed. 2d 304, 97 S. Ct. 346 (1976).

The Seventh Circuit's decision in this matter is contrary to the rules of law cited above. No presumption of constitutionality concerning Ill. Rev. Stat., 1965, ch. 91, § 5(3) was indulged by the Court. The Seventh Circuit's decision shifts the burden to the state by requiring petitioners to present evidence before the District Court to show why Section 5(3) was passed and what social benefit was expected to flow therefrom. However, the burden is not on the state to prove the constitutionality of Section 5(3), rather, it is on the

respondents to prove the unconstitutionality of that statute. *New Orleans Public Service* v. *City of New Orleans,* 281 U.S. 682 (1930).

The Seventh Circuit ignores this Court's decision in *Kelley* v. *Johnson,* 425 U.S. 238 (1976). There, a patrolman brought a civil rights action to invalidate a county police hair grooming regulation as violative of patrolmen's rights under the First and Fourteenth Amendments. The District Court dismissed the complaint, but the Court of Appeals reversed on the grounds that the defendant police department had failed to establish the relationship between the hair regulation and the interest it sought to promote. This Court reversed because the Court of Appeals did not understand the dynamics of the proper standard to apply in testing the validity of state regulations:

> ". . . [T]he question is not, as the Court of Appeals conceived it to be, whether the State can 'establish' a 'genuine public need' for the specific regulations. It is whether respondent can demonstrate that there is no rational connection between the regulations, based as it is on the county's method of organizing its police force, and the promotions of safety of persons and property." 425 U.S. at 247.

Thus, this Court held that the District Court was correct in the first instance in dismissing the patrolmen's complaint.

In the case at bar, the Seventh Circuit misconceived the proper scope of injury in testing the validity of state legislation. The burden is not on the State to present some evidence demonstrating what its interest is in Section 5(3) and how it is rationally related. (Court of Appeals opinion, Appendix A at p. A7). The *Kelley* v. *Johnson* decision clearly indicates that the burden is on respondents to demonstrate that no conceivable rational connection exists

between Section 5(3) and the promotion of safety of the citizens of Illinois. Since it is apparent that the Illinois General Assembly did not act irrationally in requiring more qualified persons than midwives to assist in childbirths, while at the same time preserving the licenses of those midwives already licensed in view of their practical experience, the District Court properly dismissed plaintiffs complaint in this matter.

The decision below bars the use of speculation on the part of a reviewing court to provide a rational basis for state qualified persons than midwives to assist in childbirths, legislation. (Appendix A at p. A5). However, this Court, in effect, has sanctioned the use of speculation. *See, McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 809-810 (1969); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Kotch* v. *Board of River Port Pilot Commissioners for Port of New Orleans,* 330 U.S. 552, 563, 91 L. Ed. 1093, 67 S. Ct. 910, *reh. den.* 331 U.S. 864, 91 L. Ed. 1869, 67 S. Ct. 1196 (1947). If the presumption that state legislation is constitional is to have any vitality, reasonable speculation concerning the reasons for legislation must be permitted.

The Seventh Circuit decision also conflicts with the Court's directive that it is not the function of a court on judicial review to sit as a super-legislature and pass on the wisdom, need, morality or appropriateness of state legislation. *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955); *Ferguson* v. *Skrupa,* 372 U.S. 276 (1963); *Olsen* v. *State of Nebraska ex rel. Western Reference and Bond Assoc., Inc.,* 313 U.S. 236 (1941). Nevertheless, if the Seventh Circuit's decision is permitted to stand, the District Court must necessarily assume that very function.

These conflicts justify issuance of a writ certiorari to review the judgment below.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING JUDICIAL REVIEW OF ALL ILLINOIS LEGISLATION ENACTED PRIOR TO 1971.

The Seventh Circuit has imposed on the State of Illinois the burden of showing why a statute was passed in order to sustain its validity. However, there is no means of satisfying that burden for Illinois legislation enacted prior to 1971.[2] Prior to the effective date of the new Illinois Constitution in 1971, no legislative history was compiled in connection with Illinois statutes. Reason and decisional law alike preclude legislators from testifying after a bill has become law as to why the legislature passed that particular bill. *N. C. Freed Co., Inc.* v. *Board of Governors of Federal Reserve System,* 473 F. 2d 1210, 1217 (2nd Cir.), *cert. den.,* 414 U.S. 827, 38 L. Ed. 2d 61, 94 S. Ct. 48 (1973); *Texas Medical Association* v. *Mathews,* 408 F. Supp. 303, 313 (W. D. Tex. 1976). Moreover, this Court has declared "frivolous" the contention that due process requires the presentation of evidence of legislative history to establish legislative intent. *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 310, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945).

Thus, for all legislation which was enacted prior to 1971, the State of Illinois is unable to produce evidence showing why a statute was passed without relying on speculation. However, the use of speculation was expressly precluded in the decision below. (Appendix A at p. A5). As a result of the Seventh Circuit's decision, all pre-1971 Illinois statutes are vulnerable to frivolous attacks since the State has no means of establishing by evidence the rational basis underlying the challenged legislation.

2. Section 5(3) was enacted in 1965.

The decision below not only involves important constitutional issues, but it also threatens the validity of all pre-1971 legislation in Illinois. These facts justify the grant of a writ of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED JUNE 6, 1978
JUNE 19, 1978
Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

BARBARA BARASA, et al., Plaintiffs-Appellants, No. 78-1123 vs. JOAN ANDERSON, Director of Illinois Department of Registration and Education, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 77-C-3383 Frank J. McGarr, *Judge.*

ORDER

There are two issues raised by this appeal. First, do expectant parents who wish to have their children delivered in their homes have a right of privacy that is violated by the refusal of the State of Illinois to license mid-

* Senior District Judge William J. Campbell, of the United States District Court for the Northern District of Illinois, is sitting by designation.

wives to assist those parents in their home births? Second, for purposes of a motion to dismiss, is a violation of the due process and equal protection clauses of the Fourteenth Amendment sufficiently alleged by a complaint stating that the State of Illinois refuses for no stated reason to license persons qualified to become midwives, while at the same time the State permits previously licensed midwives to renew their licenses annually?

I

This suit, brought under 42 U.S.C. § 1983 by two classes of plaintiffs, attacks the constitutionality of Ill. Rev. Stat. ch. 91, § 5(3),[1] which in 1965 discontinued the authority of the Department of Registration to issue licenses for the practice of midwifery. Plaintiff, in their complaint, sought a declaration that the statute is unconstitutional and an injunction against the defendant—the director of the Illinois Department of Registration and Education—prohibiting her from implementing the statute.

The first group of plaintiffs are expectant parents who desire to use the services of licensed midwives during the delivery of their children in their homes. The second group

1. Section 5(3) in its first paragraph sets out the required educational background for becoming a midwife. In its second paragraph it provides as follows:

> Without prejudice to licenses heretofore issued under this section, no further licenses shall be issued under this section after the effective date of this amendment.

The effect of non-licensure is to eliminate over time the practice of midwifery in the State of Illinois since it is a misdemeanor to practice midwifery without being licensed in that State. Ill. Rev. Stat., ch. 91, § 16n.

of plaintiffs are persons who allegedly are qualified to practice midwifery and who are desirous of engaging in the practice of midwifery in the State of Illinois.

The district court initially permitted plaintiffs to present evidence on the importance to parents of home births. However, after hearing one witness, the court declined to hear additional evidence until ruling on the defendant's motion to dismiss. The court subsequently concluded that both classes of plaintiffs failed to state a cause of action upon which relief could be granted and therefore granted defendant's motion to dismiss plaintiffs' complaint. Both classes of plaintiffs appeal that judgment. We will consider each class's claims separately.

II

The class of expectant parents argue that parental decisions concerning childbirth are personal, private decisions that are protected as fundamental, individual rights under the rubric of the "right of privacy" drawn by the Supreme Court from various constitutional provisions and applied through the Fourteenth Amendment. *See generally Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1967). It is clear that some parental decisions regarding the birth and rearing of children are deemed to be "fundamental," and therefore not subject to state interference absent a compelling state interest. *See Roe* v. *Wade*, *supra*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). It is, however, equally clear that not every decision affecting childbirth is so protected. For instance, this court has held in *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976), that a public hospital may refuse to

permit a husband to be present in a delivery room during the birth of his child. In so holding this court reasoned that "deciding the question whether the child shall be born is of a different magnitude from deciding where, *by whom,* and what method he or she shall be delivered." *Id.* at 721 (emphasis added).

It is beyond dispute that the sole question that is of concern to these expectant parents is "by whom" their child shall be delivered. The State's statutory licensing scheme does not restrict the parents from having their baby delivered in their own home, nor does it require them to do so without the assistance of competent medical personnel. A licensed doctor or qualified chiropractor can legally assist in home births. In fact, plaintiffs' sole witness was a doctor who had performed numerous such births.

All that is at issue is whether there is some fundamental right to have a specific type of individual available to parents to assist them in the delivery of their children in their homes. It is plain to us that our previous decision in *Fitzgerald, supra,* requires the conclusion that no such right exists. Therefore, the plaintiff class of expectant parents has no special interest which the statutory licensing scheme injures and thus the district court properly dismissed that portion of the complaint dealing with them.[2]

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2. Plaintiffs argue that we should not rush into deciding whether a privacy interest exists without a fuller exposition of the facts regarding the practice of midwifery. Plaintiffs, however, do not suggest what facts they could present that could demonstrate the existence of a privacy interest. This is no doubt because the issue of what constitutes a privacy interest is generally a question of law and therefore is not contingent on any specific evidentiary showing of either party.

III

The class of plaintiffs who are qualified to and wish to become midwives in the State of Illinois alleged in the complaint first, that it is arbitrary and irrational for the State to preclude them from this occupation, and second, that they are being discriminated against without justification since previously licensed midwives are permitted to renew their licenses, while these plaintiffs who have just as much skill are not permitted to acquire a license. The district court dismissed their complaint holding that "it is not difficult to imagine any number of safety and health-related reasons that the Illinois legislature could have had for its decision to limit future childbirth care to licensed physicians and specially qualified chiropractors." (Memorandum opinion, Nov. 23, 1977 at 5).

In evaluating the correctness of the district court's decision to dismiss, we should make clear at the outset that the court properly concluded that the standard of judicial review is whether the legislation is rationally related to a legitimate state interest. *See Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1954); *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). There is no distinction between the occupations that were regulated in *Williams* and *Ferguson* and the state's regulation of midwifery in this case.

The question remains, however, whether the district court can satisfy even this limited judicial review function by "imagining" health and safety factors supporting the statute and its classification between presently licensed and non-licensed, but qualified, midwives rather than requiring the State to present in some fashion its justifications for the legislation. We conclude that it cannot.

We are convinced that this case is controlled by our recent decision in *Gault* v. *Garrison,* 569 F. 2d 993 (7th Cir.

1977), where the court refused to permit the district court to dismiss an age discrimination claim that a mandatory retirement statute was irrational without initially requiring "a showing that [the legislation] rationally furthers some identifiable and articulable state purpose." *See also Miller* v. *Carter*, 547 F. 2d 1314 (7th Cir. 1977), *aff'd by an equally divided court*, 46 U.S.L.W. 4078 (1978); *England* v. *Louisiana State Board of Medical Examiners*, 263 F. 2d 661 (5th Cir.), *cert. denied*, 359 U.S. 1012 (1959).

We acknowledge the Supereme Court's admonitions—cited by defendant—that federal courts are not to sit as superlegislatures and that they should not substitute their judgment for that of the duly elected legislators who enacted a particular piece of legislation. *See, e.g., Griswold* v. *Connecticut*, 381 US. 479, 482 (1965); *Williamson, supra*, 348 U.S. at 487; *Ferguson, supra*, 372 U.S. at 730-31. We, however, do not believe that a federal court's refusal to dismiss a properly pleaded complaint alleging that a state statute is arbitrary exceeds a federal court's role in reviewing state legislation. In fact, the Court has made clear that all legislation that adversely affects an individual or class of individuals must not be arbitrary. In order to make a determination on that question, it is necessary that a federal court be given enough power to require the state to come forth with some evidence suggesting why a statute was passed and what social benefit is expected to flow from that statute. Anything less would require us to abdicate our responsibility to consider the constitutionality of state legislation that did not create a suspect classification or affect a fundamental interest. The Supreme Court has never adopted such an extreme position.

In addition, contrary to defendant's contention, we do not believe that a remand would be a waste of judicial re-

sources. Courts have a responsibility to guarantee that all executive and legislative activities meet constitutional standards. If an individual believes that he or she is being injured by the arbitrary action of one branch of government, then that individual should be able to require that branch of government to justify on judicial review the injury it is causing. The fact that the government can make a showing sufficient to withstand constitutional scrutiny does not make the exercise a waste of resources. Rather it confirms the constitutional accountability of our government. Therefore, we believe that the district court erred in dismissing plaintiffs' complaint and that it is appropriate to remand this case to the district court for further proceedings.

We wish to make clear, however, that nothing in this order is intended to suggest that the district court on remand is obligated to conduct a full trial on the social and scientific value of midwifery. Certainly the state can seek summary judgment after presenting some evidence demonstrating what its interest is in this statute and how the statute is rationally related to that interest.

For the reasons stated above, we affirm the district court's dismissal of that portion of the expectant parents' complaint that alleged a violation of their right of privacy. We, however, reverse the district court's dismissal of the qualified, but unlicensed, midwives' complaint that the statute is arbitrary and irrational and remand the case back to the district court for further proceedings not inconsistent with this order.

AFFIRMED IN PART: REVERSED IN PART AND REMANDED.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARBARA BARASA, et al.,
Plaintiffs,
v.
JOAN ANDERSON, etc.,
Defendants.
No. 77 C 3383

MEMORANDUM OPINION AND ORDER

This is a suit brought under 42 U.S.C. § 1983 by two groups of plaintiffs attacking the constitutionality of an Illinois statute which discontinued the authority of the Department of Registration and Education to issue licenses for the practice of midwifery. The pertinent part of the statute, Ill. Rev. Stats. Ch. 91, § 5a(3), reads as follows:

> Without prejudice to licenses heretofore issued under this section, no further licenses shall be issued under this section after the effective date of this amendment.

Plaintiffs seek a declaration that the statute is unconstitutional on its face and an injunction against the defendant Director of the Illinois Department of Registration and Education prohibiting her implementation of the statute.

The first group of plaintiffs, composed of expectant parents who desire to use the services of licensed midwives

in their homes, assert that the statute on its face violates the Due Process Clause of the Fourteenth Amendment in that it deprives them of their fundamental rights to privacy and freedom of expression and choice in regard to the births of their children. The second group of plaintiffs is composed of persons allegedly meeting the qualifications required by Ill. Rev. Stats. Ch. 91, § 5a(3) for the practice of midwifery and desiring to engage in that practice. (Apparently when the Illinois legislature decided to discontinue licensing midwives, it did so by amending the statute with a provision providing for such discontinuance, rather than by repealing the section setting forth the qualifications necessary for a midwife license.) These plaintiffs allege that the statute on its face violates the Due Process Clause of the Fourteenth Amendment in that it deprives them of their right to engage in the practice of the profession of their choice and that the statute violates the Equal Protection Clause of that Amendment in that it denies licenses to persons meeting certain qualifications after a certain date while allowing others similarly qualified to retain licenses issued prior to that date.

We think both groups of plaintiffs fail to state a claim upon which relief can be granted.

The plaintiff parents assert, on the authority of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loning* v. *Virginia*, 388 U.S. 1 (1967); *Roe* v. *Wade*, 410 U.S. 113 (1973); and *Doe* v. *Botton*, 410 U.S. 179 (1973), that they have a fundamental right to choose to have qualified licensed midwives to assist them in giving birth in their homes and that therefore, in order to inhibit the exercise of that right in any way, the state must show a compelling interest on its part and it must also show that the statute is narrowly drawn to express only that interest.

But every desire one may have does not rise to the level of a "fundamental right" within the meaning of these cases, and the mere fact that the desire has something to do with family life is not enough to make it "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loning* v. *Virginia*, 388 U.S. 1, 12. We hold that there is no fundamental right to choose to have childbirth at home with the assistance of qualified licensed midwives.

Having failed to assert a fundamental right, the plaintiff parents are left in the same position relative to their due process claim as are the plaintiff prospective midwives relative to theirs, to wit: they assert a wish to act in a manner inhibited by a state legislative enactment. But, unless we find Chapter 91, § 5a(3) lacking in a rational relationship to a legitimate state purpose, it is not for this court to strike it down as violating citizens' rights to substantive due process. Several clear pronouncements to that effect have been handed down by the Supreme Court in recent years in cases closely analogous to the one at bar. See *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1954); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). In *Ferguson* the Court stated:

> The doctrine that prevailed in *Lochner* [v. *New York*, 198 U.S. 45] . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . This Court does not sit to 'subject the State to intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was

> intended to secure'." [citing *Sproles* v. *Binford*, 286 U.S. 374, 388 (1932)] 372 U.S. at 730.

In *Ferguson*, the Court had been asked to review a state statute restricting the practice of the business of "debt adjusting" to people licensed to practice law; in *Lee Optical*, the statute involved made it unlawful for any person not a licensed optometrist or opthalmologist to fit lenses to a face or to duplicate lenses into frames except upon prescription. In each case the Court found it well within the state's power to legislate in the areas of health and economics and found that the legislatures could have had any number of reasons for enacting the laws they did. So, too, in the case at bar, it is not difficult to imagine any number of safety and health-related reasons that the Illinois legislature could have had for its decision to limit future childbirth care to licensed physicians and specially qualified chiropractors. We need not determine what the legislature's true motivations were, as the Supreme Court in *Lee Optical* felt it unnecessary to determine which of many rational conclusions the legislature might have reached. It is enough that we perceive that the action of the legislature is not capricious and arbitrary.

Plaintiffs seek a day in court to demonstrate the safety of home delivery with midwife assistance, but they are seeking something to which they clearly are not entitled. The court has no jurisdiction to substitute its judgment for that of the legislature, and such a hearing is unwarranted.

Neither is the equal protection argument by the plaintiffs prospective midwives compelling. That claim is essentially that the "grandfather clause" saving the licenses of midwives licensed before the effective date of the amendment is an irrational classification disfavoring persons similarly qualified after that date. But the United States

Supreme Court has upheld a similar clause in the Internal Revenue Code having a tax exemption to organizations of a particular kind organized before a certain date while discontinuing the exemption as to organizations created from that time forward. In so doing, the Court stated:

> The fact that Congress enacts a statute containing a 'grandfather clause' . . . does not of itself indicate that Congress has made an arbitrary classification. [citing cases] . . . Just as a State may provide that after a specified date newly established common carriers must obtain state approval before entering into business so as to prevent proliferation of such carriers and excessive use of the State's highways . . . Similarly Congress does not exceed its power to tax nor does it violate the Fifth Amendment when it refuses to exempt from tax newly formed corporations, the multiplication of which might burden otherwise valid federal programs. 400 U.S. at 6, 7.

Illinois does not exceed its powers when it decides not to allow the number of practicing midwives within its borders to increase.

Defendants' motion to dismiss is granted.

ENTER:

FRANK J. McGARR,
United States District Judge.

DATED: November 23, 1977